



ORANGE COUNTY  
**COASTKEEPER®**

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April 26, 2016

Via Certified Mail  
Return Receipt Requested

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300 North Flower Street  
Santa Ana, CA 92703-5000

Interim Dept. Dir. Chris Crompton  
OC Watersheds  
2301 Glassell Street, Building A  
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Robin Stieler, Clerk of the Board  
Orange County Board of Supervisors  
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**Re: Notice of Violation and Intent to File Suit Under the Clean Water Act**

Dear Mr. Silsby, Mr. Crompton, Ms. Stieler, and Ms. Page,

I am writing on behalf of Orange County Coastkeeper ("Coastkeeper") to notify you that the County of Orange ("Orange County") is in ongoing and continuing violation of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 ("Clean Water Act" or "CWA") and to invite you to contact us to schedule a meeting and begin discussing actual solutions to the continued discharge of fecal coliform bacteria to Newport Bay in violation of the Clean Water Act.

Coastkeeper submits this letter on behalf of this organization and its members who use and enjoy Newport Bay and are harmed by Orange County's failure to fulfill its obligations. The purpose of this letter is to provide Orange County with notice of Coastkeeper's intent to file a third party civil action against Orange County for these violations after a period of sixty (60) days following receipt of this letter, pursuant to section 505(b)(1)(A) of the CWA, 33 U.S.C. § 1365(b)(1)(A), which requires sixty days notice of alleged violations prior to the commencement of a citizens' suit.

This letter provides notice of Orange County's unlawful discharge of fecal coliform bacteria to Newport Bay in violation of the Municipal Separate Storm Sewer System ("MS4") Permit, National Pollution Discharge Elimination System ("NPDES") No. CAS618030, Order No. R8-2009-0030, as amended by Order No. R8-2010-0062, California Regional Water Quality Control

Board Santa Ana Region (“MS4 Permit”). The violations of the MS4 Permit alleged in this letter concern Orange County’s failure to prohibit discharges not in compliance with the Water Quality Control Plan for the Santa Ana River Basin (“Basin Plan”), failure to prohibit the discharge from its MS4 that cause or contribute to exceedances of water quality standards, failure to prevent discharges from its MS4 from causing or contributing to a condition of pollution, contamination, or nuisance, and failure to meet its reporting deadlines as established in Table 5-9(f)-(g) of the fecal coliform TMDL, as incorporated in Section XVIII.C. the MS4 Permit. Violations of the MS4 Permit’s requirements constitute ongoing violations for purposes of CWA enforcement.

Municipal discharges constitute a significant source of fecal coliform bacteria to Newport Bay and its tributaries. Studies of Orange County bacterial water quality indicate urban runoff, “especially dry weather runoff,” is a “major contributing factor to the Orange County coastal bacterial contamination problems.”<sup>1</sup> Human illnesses have been linked to recreational activities in coastal waters near storm drain outlets.<sup>2</sup> Pathogens, such as bacteria, can impact water contact recreation, shellfish harvesting, and result in the closure of recreational beaches by the Orange County Health Officer.<sup>3</sup>

Strict compliance with MS4 Permit requirements and prohibitions are necessary to protect water quality standards of the receiving waters and restore water quality for those areas subject to TMDLs.<sup>4</sup> The Regional Board adopted a Total Maximum Daily Load (“TMDL”) for impairments to two beneficial uses in Newport Bay caused by fecal coliform bacteria contamination from vessel waste and urban runoff from the MS4.<sup>5</sup> The fecal coliform TMDL included two deadlines to protect those beneficial uses, the deadline for one use passed over a year ago and the second is quickly approaching. Orange County has admitted to missing its obligation of meeting the REC-1 water quality standard deadline, which it was given 14 years to meet. Orange County lacks the commitment and the capacity to achieve these rational deadlines. Although Orange County has known the causes of the Bay’s high fecal coliform levels for decades, it has failed to implement the fecal coliform TMDL sufficient to control the sources of bacteria adversely affecting Newport Bay.

Section 505(b) of the Clean Water Act requires a citizen to give notice of intent to file suit sixty (60) days prior to the initiation of a civil action under 505(a)(1) of the Clean Water Act.<sup>6</sup> Notice must be given to the head of the entity responsible for the violations, the Administrator of the United States Environmental Protection Agency (“EPA”), the Regional Administrator of the EPA for the region in which the violations occurred, and the chief administrative officer of the water pollution control agency for the State in which the violations occurred.<sup>7</sup>

Pursuant to the Clean Water Act, Coastkeeper hereby puts Orange County on formal notice that, after the expiration of sixty (60) days from the date of this Notice of Violation and Intent to

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<sup>1</sup> Municipal Separate Storm Sewer System (“MS4”) Permit, National Pollution Discharge Elimination System (“NPDES”) No. CAS618030, Order No. R8-2009-0030, as amended by Order No. R8-2010-0062, California Regional Water Quality Control Board Santa Ana Region, Finding 34 [hereinafter MS4 Permit].

<sup>2</sup> MS4 Permit, Finding 37.

<sup>3</sup> MS4 Permit, Finding 36.

<sup>4</sup> See MS4 Permit, Finding 3.

<sup>5</sup> MS4 Permit, Finding 45.

<sup>6</sup> 33 U.S.C. § 1365(a)-(b) (2014).

<sup>7</sup> 33 U.S.C. § 1365(b)(1)(A); see also 40 C.F.R. § 135.2(a)(2) (2015).

File Suit (“Notice Letter”), Coastkeeper intends to file suit in federal district court pursuant to Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), against the persons responsible for the violations described in this Notice Letter. We encourage Orange County to contact us during the sixty-day notice period to facilitate a discussion on the issues and the possible remedies to Orange County’s continued non-compliance with its permit obligations.

## I. ORGANIZATIONAL BACKGROUND

Coastkeeper is a non-profit public benefit corporation organized under the laws of the State of California with its office at 3151 Airway Avenue, Suite F-110, Costa Mesa, California 92626. Coastkeeper has over 2,000 members who live and/or recreate in and around Newport Bay and its watershed. Coastkeeper is dedicated to the preservation, protection, and defense of the environment, wildlife, and natural resources of Orange County. To further these goals, Coastkeeper actively seeks federal and state agency implementation of the Clean Water Act, and, where necessary, directly initiates enforcement actions on behalf of itself and its members.

Members of Coastkeeper use and enjoy the waters that Orange County discharges into, including the Newport Bay watershed. Members of Coastkeeper use and enjoy Newport Bay and its tributaries to enjoy water sports and other water activities, view wildlife, and engage in scientific study, including monitoring activities. The discharge of pollutants from Orange County impairs each of these uses. Further, discharges of polluted stormwater from Orange County are ongoing and continuous. Thus, the interests of Coastkeeper’s members have been, are being, and will continue to be adversely affected by Orange County’s failure to comply with the Clean Water Act and the MS4 Permit.

## II. NEWPORT BAY AND THE MANNER IN WHICH IT IS IMPACTED BY ORANGE COUNTY’S CLEAN WATER ACT VIOLATIONS

Newport Bay is Orange County’s gateway to the world for millions of visitors who descend over Upper Newport Bay to John Wayne Airport or arrive through the commercial or recreational marinas in Lower Newport Bay. The second largest estuarine embayment in southern California,<sup>8</sup> Newport Bay is the nation’s largest small craft harbor and a center for tour and charter boat operations, along with more than sixty different commercial ventures, rowing clubs, yacht races, and resorts. Newport Bay is home to numerous species of mammals, fish, invertebrates, native plants, and at least six endangered species, including the California Least Tern, the California Brown Pelican, and the Light-footed Clapper Rail.<sup>9</sup> Roughly 30,000 birds visit the Bay each year, and approximately eighty species of fish and over one thousand species of marine invertebrates can be found in the Bay.<sup>10</sup> Upper Newport Bay contains aquatic, riparian, and mudflat habitats, salt marsh, and includes the 700-acre Upper Newport Bay Ecological Reserve (“Reserve”). The Reserve plays a significant role in providing critical habitat for migratory waterfowl and shorebirds. The City of

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<sup>8</sup> EOA, Inc., *Newport Bay Fecal Coliform Source Management Plan 1* (Dec. 31, 2009) [hereinafter *NB FCSMP*].

<sup>9</sup> Harbor Area Management Plan (June 2009); NEWPORT BEACH CITY COUNCIL STAFF REPORT (February 10, 2004); Watershed Executive Committee (July 27, 2004).

<sup>10</sup> NEWPORT BAY CONSERVANCY, <http://newportbay.org/wildlife/marine-life/fish-of-upper-newport-bay/> (last visited April 14, 2016); UPPER NEWPORT BAY FEASIBILITY STUDY, FINAL REPORT 1-7 (Sept. 08, 2000), available at <http://planning.usace.army.mil/toolbox/library/PCC2/ER%20tab%201.pdf>.

Newport Beach would not be the world-class destination that it is without the environmental resource of Upper Newport Bay, the economic resource of the Lower Harbor, and the aesthetic and recreational value of its shoreline.<sup>11</sup>

The Regional Board is charged with protecting Newport Bay. The Regional Board's Basin Plan establishes water quality standards ("WQS") (the beneficial uses and the water quality objectives) for surface waters in the Region, including Newport Bay.<sup>12</sup> The Basin Plan protects the Bay's uses that make it a world-class destination.<sup>13</sup> The Basin Plan looks to the various ways water can be used for the benefit of people and/or wildlife and the water quality criteria necessary to protect those uses.<sup>14</sup> In establishing the Basin Plan, the Regional Board assigned more beneficial uses to Newport Bay than any water body in our region.<sup>15</sup> Chief among them are water contact recreation ("REC-1") and shellfish harvesting ("SHEL").<sup>16</sup> REC-1 waters are used for recreational activities involving body contact where ingestion of water is reasonably possible.<sup>17</sup> The REC-1 standard ensures the Bay stays protected for activities including swimming, wading, water-skiing, scuba diving, and fishing.<sup>18</sup> The SHEL standard ensures that the Bay will continue to serve as a habitat for shellfish collected for human consumption, commercial use, or sports.<sup>19</sup>

Pathogens, which are disease-causing organisms,<sup>20</sup> have long-threatened Newport Bay's attractive recreational and shellfish harvesting uses. Consistently high total coliform bacteria levels closed the upper portion of Upper Newport Bay to both uses in 1974.<sup>21</sup> Soon after, in 1978, despite its history as a site for a booming commercial fishing industry, the shellfish harvesting prohibition was expanded to the entire Upper Newport Bay.<sup>22</sup> Portions of the entire Newport Bay are also closed to REC-1 uses on a temporary basis, dependent on storms.<sup>23</sup> The Basin Plan identified the

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<sup>11</sup> Newport Beach City Council Meeting, March 28, 2000.

<sup>12</sup> Resolution No. 99-10; Resolution No. 99-066; California Regional Water Quality Control Board, Santa Ana Region, Water Quality Control Plan, Santa Ana River Basin (8), at 3-1 (Feb. 2016) [hereinafter *Basin Plan*].

<sup>13</sup> *Basin Plan*, at 1-1.

<sup>14</sup> *Basin Plan*, at 3-2.

<sup>15</sup> Other beneficial uses in Newport Bay include: Commercial and Sport Fishing ("COMM"); Marine Habitat ("MAR"); Preservation of Rare and Endangered Species ("RARE"); Water Contact Recreation ("REC-1"); Non-contact Recreation ("REC-2"); Fish Spawning ("SPWN"); Shellfish Harvesting ("SHEL"); and Wildlife Habitat ("WILD"). *Id.* Additionally, Lower Newport Bay supports Navigation ("NAV"); while Upper Newport Bay supports the beneficial uses of Estuarine Habitat ("EST") and Preservation of Biological Habitats of Special Significance ("BIOL"). *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Basin Plan*, at 3-4.

<sup>20</sup> Environmental Science Deskbook § 6.36 (James W. Conrad, Jr. ed., Thomson Reuters/West 2011) [hereinafter "Environmental Science Deskbook"]

<sup>21</sup> *Basin Plan*, at 5-112.

<sup>22</sup> *Basin Plan*, at 5-147. This prohibition was primarily due to poor water quality resulting from nutrient enrichment, trace metals, and organics. *See* Harbor Area Management Plan, 2-45. Orange County Health Care Agency ("OCHCA") generally advises against consuming any shellfish in Newport Bay. *See* UPPER NEWPORT BAY FEASIBILITY STUDY, FINAL REPORT (Sept. 08, 2000) at 2-42; *see also* Harbor Area Management Plan, (citing Central Orange County Integrated Regional and Coastal Watershed Management Plan 2-40 (August 2007)).

<sup>23</sup> *Basin Plan*, at 5-147.

principal sources of coliform into the Bay are from tributary inflows, composed of urban and agricultural runoff, including stormwater, and vessel sanitary waste.<sup>24</sup>

One of the traditional indicator bacteria used to identify pathogens is fecal coliform. Fecal coliform predominantly results from human feces in surface waters, although many other warm-blooded animals excrete these organisms as well.<sup>25</sup> Fecal coliform is a reliable indicator that harmful pathogens may be present in a water sample.<sup>26</sup> Water-borne pathogens may cause gastroenteritis, fever, flu-like symptoms, respiratory illness, cryptosporidiosis, dysentery, ear infections, or hepatitis A.<sup>27</sup> Such ailments directly impact the Bay's appeal, which reduces its use by local residents and visitors. Furthermore, the pathogens threaten the Bay's health, which impacts its access to visitors and its role as a thriving habitat for shellfish.<sup>28</sup>

In 1986, as an initial step to address the pathogen problem, the Regional Board identified Newport Bay as a water quality limited receiving water body for pathogens in accordance with Section 303(d) of the Federal Clean Water Act.<sup>29</sup> Although the Bay was 303(d) listed, the REC-1 and SHEL uses were not adequately protected.

In 1997, Defend the Bay, a non-profit Newport Beach-based environmental organization, sued the United States Environmental Protection Agency ("USEPA") for failing to adopt pollution limits, or TMDL, for Newport Bay, as required by the CWA.<sup>30</sup> The parties resolved the litigation by entering into a consent decree that required USEPA to establish or approve a bacterial TMDL by April 15, 2000. In 1999, the Regional Board adopted the fecal coliform TMDL in the Basin Plan.<sup>31</sup> Also in 1999, the Office of Administrative Law ("OAL") and the State of California approved the TMDL and submitted it for USEPA approval.<sup>32</sup>

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<sup>24</sup> *Basin Plan*, at 5-112. The TMDL specifies WLAs for vessel waste and urban runoff, including stormwater, the quality of which is regulated under the MS4 permit. LAs were specified for fecal coliform inputs from agricultural runoff, including stormwater, and natural sources. *Id.* The primary tributaries into Newport Bay include Big Canyon Wash, San Diego Creek, and Santa Ana Delhi Channel. *Id.*

<sup>25</sup> Environmental Science Deskbook § 6.36.

<sup>26</sup> Environmental Science Deskbook § 6.22.

<sup>27</sup> STATE WATER RESOURCES CONTROL BOARD, 2002 CALIFORNIA 305(B) REPORT OF WATER QUALITY 108 (Aug. 2003). "Pollutants in urban runoff could adversely impact human health and the environment. Human illnesses have been linked to recreational activities in coastal waters especially near storm drain outlets. Bioaccumulation of pollutants, present in urban runoff, can occur in fish and other aquatic organisms. These organisms may be consumed by birds and humans." MS4 Permit, Finding 37.

<sup>28</sup> See MS4 Permit, Finding 36.

<sup>29</sup> NB FCSMP, at xv.

<sup>30</sup> *Defend the Bay v. Marcus* (N.D. Cal. No. C-97-3997 MMC). The Consent Decree also formed sediment (adopted October 9, 1998), nutrient (effective April 16, 1999), and toxics materials (effective April 4, 2003) TMDLs. A TMDL is the total amount of the pollutant that can be discharged while water quality standards in the receiving water are attained, i.e., water quality objectives are met and the beneficial uses are protected. MS4 Permit, at 15.

<sup>31</sup> Resolution No. 99-10; Resolution No. 99-066.

<sup>32</sup> See USEPA, *Staff Report Supporting Approval of TMDLs: Fecal Coliform Bacteria- Upper Newport Bay and Lower Newport Bay*, CA 1 (Feb. 17, 2000) [hereinafter *Staff Report*].

USEPA approved the Newport Bay fecal coliform TMDL on February 28, 2000, and in doing so, met the consent decree requirement from the *Defend the Bay* lawsuit.<sup>33</sup> USEPA's approval confirmed that the TMDL met all the required elements.<sup>34</sup> The fecal coliform TMDL implementation plan established a compliance deadline to support REC-1 WQS by December 30, 2013 and a compliance deadline to support the SHEL water quality standard by December 30, 2019.<sup>35</sup> USEPA affirmed this "rapid but reasonable timeframe" was to ensure the protection of the watershed's fish, wildlife, and people from pollution.<sup>36</sup> The deadline for REC-1 has since passed and the SHEL deadline is approaching quickly. Compliance with objectives to protect water contact recreation was given the reasonable deadline that they be achieved no later than 14 years after the State approved the TMDL.<sup>37</sup> Thus, since 1999, Orange County has had the opportunity to dispute the deadline in anticipation of it needing more time to address the bacterial pollutant problem. Similarly, the objective to protect shellfish harvesting was to be met no later than 20 years after the State approved the TMDL, this timeline has also never been challenged since it was established in 1999. Orange County's failure to meet its monitoring, reporting, and REC-1 deadlines cause actual harm to the Coastkeeper's members. Each missed obligation prolongs the pollutant problem, thereby limiting our members' right to access to use the Bay as it is intended by the State of California and the USEPA.

The fecal coliform TMDL is enforceable against Orange County through the existing MS4 permit.<sup>38</sup> Orange County's MS4 carries urban runoff from local storm drains to the receiving waters, which include inland rivers, Newport Bay, and ocean waters.<sup>39</sup> The MS4 includes storm drains

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<sup>33</sup> See *Staff Report*, at 1; CAL. CODE REGS tit. 33 § 3975 (2016).

<sup>34</sup> See *Staff Report*, at 1.

<sup>35</sup> MS4 Permit, at 74. See also Resolution 99-10 (however, elsewhere in Res. 99-10 states the REC-1 deadline as December 31, 2014).

<sup>36</sup> 1997 WL 33757711 (E.P.A.). The agreement included a schedule for pathogens by January 15, 2000 wherein USEPA would provide technical and financial assistance to support California's implementation of the TMDLs. The agreement was deemed an "important step towards cleaner streams and beaches in Orange County" by U.S. Attorney Michael Yamaguchi. USEPA, U.S. EPA Settles Suit, Addresses Newport Bay Watershed Pollution (Oct. 31, 1997). The TMDL included a plan and a schedule. The implementation plan included requirements for proposed plans, studies and monitoring. The Regional Board approved plans including developing a Fecal Coliform transport and fate model; REC-1 beneficial use assessment; identify and characterize Fecal Coliform sources in the Dunes Resort and agricultural runoff; and evaluation of the vessel waste program. *Id.*

<sup>37</sup> CAL. CODE REGS tit. 33 § 3975 (2016).

<sup>38</sup> TMDLs are plans and must be incorporated into an NPDES permit to become enforceable. Thus, the Fecal Coliform TMDL was incorporated into the Orange County MS4 permit, which is an NPDES permit that regulates the municipal storm sewer system, shortly after the TMDL's approval. The permit was issued under the NPDES by the Regional Board and regulates the discharge of "both dry-weather and stormwater runoff into and out of our city's storm drain system." The Regional Board adopted the NPDES Permit in January 2002, followed by an updated MS4 Permit in 2007. Organochlorine Compounds (OCs) TMDL, February 27, 2007. The State Board predicted that "[a]s total maximum daily loads (TMDLs) are developed, it is likely that MS4s [would] have to participate in pollutant load reductions, and the MS4 permits are the most effective vehicles for those reductions." Organochlorine Compounds (OCs) TMDL (February 27, 2007).

<sup>39</sup> MS4 Permit, Finding 19.

operated by the regulated entities, including Orange County.<sup>40</sup> The MS4 permittees serve a population of approximately 3.1 million, occupying an area of approximately 789 square miles. The permittees are responsible for operating and maintaining an estimated 740 miles of storm drains.<sup>41</sup>

According to the Permit, compliance determinations for TMDLs are based on monitoring within the receiving waters.<sup>42</sup> Specifically, compliance determination for the fecal coliform TMDL is based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay.<sup>43</sup> The Permit specified effluent limits based on fecal coliform to ensure consistency with the wasteload allocations developed in the TMDL.<sup>44</sup> If a permittee's monitoring results indicate an exceedance of wasteload allocations, the permittee is required to reevaluate its control measures and propose additional BMPs/control measures.<sup>45</sup> Such reevaluations and proposals are then required to be submitted to the Executive Officer within 12 months of determining that an exceedance has occurred.<sup>46</sup> Upon approval, the permittee is immediately required to start implementing the revised plan.<sup>47</sup>

Information available to Coastkeeper indicates Orange County's monitoring, conducted at the representative sampling locations within San Diego Creek and Newport Bay, demonstrate persistent fecal coliform bacteria levels above those allowed under the MS4 Permit. Thus, Orange County was required to submit revised control measures, and/or propose additional control measures to the Executive Officer. Information available to Coastkeeper indicates that Orange County did not submit such reevaluations or proposals within 12 months of its evidenced exceedances. The REC-1 water quality standard is still not being met, the deadline has passed for the submission of a revised implementation plan as part of this phased TMDL, thus, Orange County is in violation of the MS4 Permit. By failing to comply with the requirements of the MS4 Permit, Orange County has in turn violated its NPDES permit. Discharges unauthorized by an NPDES Permit are prohibited by the Clean Water Act. Orange County's noncompliance with the permit constitutes a violation of the Clean Water Act.<sup>48</sup>

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<sup>40</sup> The County is a regulated entity, or permittee, under the MS4 Permit, as it (collectively with the other permittees) submitted NPDES Application No. CAS618030 and a Report of Waste Discharge for reissuance of its areawide urban storm water permit. MS4 Permit, Finding 6.

<sup>41</sup> MS4 Permit, Finding 18.

<sup>42</sup> MS4 Permit, Section XVIII.C.1.

<sup>43</sup> *Id.*

<sup>44</sup> The fecal coliform TMDL specifies WLAs for urban runoff to protect water contact recreation and shellfish harvesting beneficial uses.

<sup>45</sup> MS4 Permit, at 79.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174 (2000); *see* 40 C.F.R. § 122.41(a) (2015); 33 U.S.C. §§ 1311(a); 1342(a); 1365(t).



### III. THE MUNICIPAL SEPARATE STORM SEWER SYSTEM, THE FECAL COLIFORM TMDL, AND THE ENTITY RESPONSIBLE FOR THE CLEAN WATER ACT VIOLATIONS

In 1972, Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,”<sup>49</sup> with the “interim goal” that wherever attainable, “water quality which provides for the protection of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983.”<sup>50</sup> To achieve this goal, the Clean Water Act established a mechanism for regulating the discharge of pollutants from point sources through the National Pollutant Discharge Elimination System (“NPDES”) permitting framework. Section 301 of the Clean Water Act prohibits the discharge of any pollutant, by any person, from any point source to waters of the United States, except where expressly authorized under a valid NPDES permit issued by the United States Environmental Protection Agency (“EPA”) or the EPA-delegated State permitting authority.<sup>51</sup> California is a delegated state authorized to issue NPDES permits.<sup>52</sup> NPDES permits are issued pursuant to state law by either the State Water Resources Control Board (“State Board”) or one of the nine Regional Water Quality Control Boards (“Regional Board(s)”) with the primary responsibility for controlling water quality.<sup>53</sup> Regional Boards then establish and issue an NPDES Permit, as required under the Clean Water Act, to discharge storm water runoff from the MS4, subject to the Permit’s requirements.<sup>54</sup> The MS4 Permit in this case incorporates water quality standards from the Santa Ana Basin Plan. “Noncompliance with [the] permit constitutes a violation of the Act.”<sup>55</sup> MS4 Permit enforcement is necessary to ensure the Basin Plan objectives are met because MS4 permittees are primary dischargers to many of the State’s water quality limited receiving water bodies that the Basin Plan intends to preserve.

#### A. Orange County’s Municipal Separate Storm Sewer System and the MS4 Permit

Orange County owns and operates its MS4. An MS4 is defined as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains)” owned or operated by a State, city, or town that is designed or used for collecting or conveying stormwater and that discharges to waters of the United States.<sup>56</sup>

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<sup>49</sup> 33 U.S.C. § 1251(a) (2012).

<sup>50</sup> 33 U.S.C. § 1251(a)(2).

<sup>51</sup> 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12)(A); 40 C.F.R. § 122.2.

<sup>52</sup> See 33 U.S.C. § 1342(b); A permitting authority uses an NPDES permit to employ two primary strategies, (1) applying uniform effluent limits to a point of discharge and (2) applying ambient WQS, which protect the beneficial uses of the receiving water. Minan, at 1223-24 (citing Clean Water Act Section 402(a)(2) which states that the “Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) [section 402(a)(1)].” Clean Water Act § 402(a)(2), 33 U.S.C. 1342(a)(2) (2000). Paragraph (1) requires compliance with provisions of section 301, which contains the WQS requirements. Section 301 directs, among other things, achievement of “any more stringent limitation, including those necessary to meet water quality standards” established by state law. Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (2000).

<sup>53</sup> CAL. WATER CODE §§ 13001, 13050(a)–(b), 13200 (West 2014).

<sup>54</sup> NRDC v. County of L.A., 2015 U.S. Dist. LEXIS 40761 (2015).

<sup>55</sup> *Friends of the Earth*, at 174; see 40 C.F.R. § 122.41(a) (2015); 33 U.S.C. §§ 1311(a); 1342(a); 1365(f).

<sup>56</sup> See 40 C.F.R. § 122.26(b)(8)(i)–(ii); see also 40 C.F.R. § 122.26(b)(18).



Orange County's MS4 consists of streets, curbs, gutters, drop inlets, underground pipes, concrete channels, and other structures that convey stormwater in and around Orange County within the jurisdiction of the Regional Board. The MS4 serves approximately 3.1 million and includes an estimated 740 miles of storm drains. These storm drains, as well as other conveyances, discharge to waters of the United States, including Newport Bay and its tributaries. Each time it rains, contaminated stormwater carries bacteria from around Orange County to Newport Bay and its tributaries via the MS4. Similarly, non-stormwater flows, such as those from vessels, excessive irrigation, and sanitary sewer overflows, discharge from the MS4 to Newport Bay and its tributaries.

Section 402(p) of the Clean Water Act establishes the permitting framework for MS4<sup>57</sup> discharges.<sup>58</sup> Section 402(p) of the CWA requires an NPDES permit for stormwater discharges from an MS4 to waters of the United States. Section 402(p)(3)(B) of the CWA sets forth the requirements that must be in all MS4 permits, including the obligation to (1) "effectively prohibit non-stormwater discharges into the storm sewers,"<sup>59</sup> and (2) "require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as . . . appropriate for the control of such pollutants."<sup>60</sup> The maximum extent practicable ("MEP") standard "imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible."<sup>61</sup> Section 402(p)'s language has been interpreted by California courts to grant the Regional Board "the discretion to impose 'appropriate' water pollution controls in addition to those that come within the definition of 'maximum extent practicable.'"<sup>62</sup> The Regional Board adopted Order No. R8-2009-0030, as amended by Order No. R8-2010-0062,<sup>63</sup> to act as Orange County's MS4 permit under Section 402(p) of the Clean Water Act.

Orange County acts as the principal permittee responsible for the overall program management, the incorporated cities of Orange County within the Regional Board's jurisdiction are the co-permittees.<sup>64</sup> The permittees, including Orange County, are subject to the terms and conditions of the MS4 Permit. The MS4 Permit allows permittees to discharge stormwater runoff from storm drains and other stormwater conveyances within their jurisdictions. Orange County retains jurisdiction over and/or maintenance responsibilities for the MS4. The Permit includes

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<sup>57</sup> Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains) 40 C.F.R. § 122.26(b)(8).

<sup>58</sup> 33 U.S.C. § 1342(p).

<sup>59</sup> 33 U.S.C. § 1342(p)(3)(B)(ii).

<sup>60</sup> 33 U.S.C. § 1342(p)(3)(B)(iii); *See also* Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd., 124 Cal. App. 4th 866 (2004), as modified on denial of reh'g (Jan. 4, 2005) ("Regional and state water control boards, in issuing comprehensive municipal stormwater sewer permit, were not prohibited by Clean Water Act "maximum extent practicable" standard of stormwater pollutant abatement from including provisions in permit which required that municipalities comply with state water quality standards;").

<sup>61</sup> *Defenders of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 131 (D.D.C. 2001); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885 (8th Cir. 1995) ("feasible" means "physically possible").

<sup>62</sup> *Bldg. Industries Ass'n of San Diego Cty. v. State Water Res. Control Bd.*, 124 Cal. App. 4th at 883 (citing *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165-1167).

<sup>63</sup> *See generally* MS4 Permit.

<sup>64</sup> MS4 permit, Sections I and II; *Basin Plan*, at 5-121.

requirements necessary to protect WQS of receiving waters, including Newport Bay.<sup>65</sup> The Permit also includes MS4 discharge prohibitions, such as those that “cause or contribute to a condition of pollution, contamination, or nuisance, as those terms are defined in Section 13050 of the California Water Code.”<sup>66</sup> Furthermore, the Permit incorporates the reporting schedule of Tables 5-9(f) and 5-9(g) in the fecal coliform TMDL.

## **B. Newport Bay Fecal Coliform Total Maximum Daily Load**

The Newport Bay Fecal Coliform TMDL is implemented through the MS4 Permit. The MS4 Permit requires Orange County to comply with the Newport Bay Fecal Coliform TMDL’s wasteload allocations for urban runoff and/or storm water by implementing necessary BMPs.<sup>67</sup> The TMDL, wasteload allocations and load allocations were established to assure compliance with REC-1 standards no later than December 30, 2014 and SHEL standards no later than December 30, 2019.<sup>68</sup> The TMDL contains monitoring requirements, including data collection parameters and frequencies, and reporting requirements.

Newport Bay Fecal Coliform TMDL compliance determinations are based on monitoring conducted at thirty-four (34) representative sampling locations within San Diego Creek and Newport Bay.<sup>69</sup> At a minimum, the TMDL’s sampling program requires the collection of five (5) sample/30 days at the stations specified in the TMDL and analysis of the samples for total and fecal coliform and enterococci.<sup>70</sup> Compliance with the Fecal Coliform TMDL for REC-1 is measured against a five sample/30 days geometric mean less than 200 organisms/100 mL, and not more than 10% of the samples exceed 400 organisms/100 mL for any 30-day period.<sup>71</sup> Results are submitted monthly. An annual report evaluating compliance with the water quality objectives is required to be submitted each September 1st.<sup>72</sup>

## **IV. VIOLATIONS OF THE CLEAN WATER ACT**

The Orange County MS4 Permit requires Permittees to monitor thirty-four representative stations located in Newport Bay; take water quality samples at each location five times every thirty days; submit reports monthly; and submit annual reports to the Regional Board describing the Permittees’ plan to remedy any violations. A monitoring station whose sample analysis yields results greater than the Newport Bay Fecal Coliform TMDL’s standard of 5-sample/30-days Geometric Mean less than 200 organisms/100 mL, and not more than 10% of samples exceeding 400 organisms/100 mL for any 30-day period is violating the MS4 Permit’s requirements. *See Attachment*

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<sup>65</sup> MS4 Permit, Finding 19. Newport Bay and its tributaries are waters of the US. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 122.2.

<sup>66</sup> MS4 Permit, III.7.

<sup>67</sup> 40 C.F.R. 122.44(d)(vii)(B); MS4 Permit, Finding 52.

<sup>68</sup> *Basin Plan*, at 5-115; Table 8A of the MS4 Permit requires urban runoff waste load allocations, total maximum daily load for fecal coliform, and load allocations for fecal coliform in agricultural runoff, including stormwater discharges, to assure REC-1 standards as soon as possible, but no later than December 30, 2013. MS4 Permit, XVIII.C.1.; *see also Basin Plan*, at 5-115, Table 5-9f.

<sup>69</sup> MS4 Permit, XVIII.C.1.; *Basin Plan*, at 5-120, Table 5-9h.

<sup>70</sup> *Basin Plan*, at 5-120, Table 5-9h.

<sup>71</sup> *Basin Plan*, at 5-115, Table 5-9f.

<sup>72</sup> *Basin Plan*, at 5-117, Table 5-9g.

14. Orange County's monthly and annual reports, as well as other monitoring data in their possession, document the Permittee's monitoring stations regularly exceed the wasteload allocations in the Newport Bay Fecal Coliform TMDL, in violation of the MS4 Permit and the Clean Water Act.

As discussed in greater detail below, the Permittee's reported monitoring did not comply with the Fecal Coliform TMDL's requirements and the samples that were collected demonstrate fecal coliform exceedances on dozens of occasions during wet and dry seasons. Each of Orange County's prohibited discharges contribute to the ongoing and continuous bacterial problem in Newport Bay. Each of Orange County's missed reporting deadlines contributed to cascading failures to meet the established fecal coliform limits necessary to meet WQS. The reports that have been submitted misrepresent the facts. Instead of measuring compliance of fecal coliform limits as required by the MS4 Permit, Orange County developed its own standard and applied data to the artificial standard rather than the standard adopted by the Regional Board and approved by the EPA. The incorporation of these artificial standards diminish the utility of the mandatory reporting to analyze Orange County's compliance with the MS4 Permit. Accurate reporting could have resulted in attainment of REC-1 WQS by the TMDL's deadline had necessary BMP improvements been made in response to elevated fecal coliform bacteria levels in Newport Bay. Consequently, the lack of proper reporting and monitoring has resulted in Coastkeeper's members continued to be harmed due to the ongoing and continuous bacterial problem impacting Newport Bay.

**A. Orange County's Discharges of Polluted Water in Violation of Discharge Limitation/Prohibition 2, 6 and 7 of the MS4 Permit and the Clean Water Act.**

**1. Discharge Limitation/Prohibition 2**

Discharge Limitation/Prohibition 2 of the MS4 Permit prohibits Orange County from discharging storm water from its MS4 to waters of the United States containing pollutants that have not been reduced to the MEP. MS4 permits shall, along with other requirements, require controls to reduce the discharge of pollutants to the MEP, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.<sup>73</sup> The Regional Board adopted the Newport Bay Fecal Coliform TMDL to assure compliance with REC-1 standards no later than December 30, 2014 and with SHEL standards no later than December 30, 2019.<sup>74</sup>

Orange County's failure to implement control techniques necessary to comply with the Newport Bay Fecal Coliform TMDL REC-1 deadline is a violation of the MS4 Permit's MEP standard. Monthly and annual reports submitted by Orange County demonstrate monitoring sites exceed TMDL WLAs after the REC-1 deadline. Orange County's pollution controls were, and remain, insufficient for Newport Bay to attain REC-1 or SHEL WQS within the period contemplated by the Regional Board when they adopted the Newport Bay Fecal Coliform TMDL.

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<sup>73</sup> 33 U.S.C. § 1342(p)(3)(B)(iii); *see also* Bldg. Indus. Ass'n of San Diego Cty. v. State Water Res. Control Bd., 124 Cal. App. 4th 866, 874 (2004) as modified on denial of reh'g (Jan. 4, 2005).

<sup>74</sup> *Basin Plan*, at 5-148.

Orange County's failure to properly implement the Newport Bay Fecal Coliform TMDL and the resulting discharge of fecal coliform contaminated storm water into Newport Bay from its MS4 that have not been reduced to the MFP is ongoing and continuous. Each of these discharges is itself a violation of Discharge Limitation/Prohibition 2 of the MS4 Permit. Orange County's violations will continue each day and/or occasion that Orange County discharges contaminated water into Newport Bay in violation of the requirements of the MS4 Permit and the Clean Water Act. Orange County is subject to penalties for all violations of the Clean Water Act occurring in the five (5) years prior to the date of this Notice Letter.

2. Discharge Limitation/Prohibition 6

Discharge Limitation/Prohibition 6 of the MS4 Permit requires that discharges from the MS4 be in compliance with the applicable discharge prohibitions contained in Chapter 5 of the Basin Plan. Chapter 5 of the Basin Plan contains the Newport Bay Fecal Coliform TMDL, which requires fecal coliform waste load allocation ("WLA") and load allocation ("LA") compliance no later than December 30, 2014 for REC-1 and December 30, 2019 for SHEL.<sup>75</sup> TMDL compliance is based on monitoring conducted at representative sampling locations within San Diego Creek and Newport Bay.<sup>76</sup>

As previously discussed, Orange County has failed to timely implement the control measures and other actions necessary under the MS4 Permit to reduce fecal coliform concentrations from Orange County's MS4 to levels necessary to achieve compliance with WQS in Newport Bay for REC-1 within the deadline provided in Chapter 5 of the Basin Plan and the MS4 Permit. As such, Orange County's failure to meet the Basin Plan and MS4 Permit's REC-1 deadline constitutes a violation of Discharge Limitation/Prohibition 6.

Orange County's failure to properly implement the Newport Bay Fecal Coliform TMDL and the resulting discharge of contaminated water into Newport Bay are ongoing and continuous. Each of these discharges is itself a violation of Discharge Limitation/Prohibition 6 of the MS4 Permit. Orange County's violations will continue each day and/or occasion that Orange County discharges contaminated water into Newport Bay in violation of the requirements of the MS4 Permit and the Clean Water Act. Orange County is subject to penalties for all violations of the Clean Water Act occurring in the five (5) years prior to the date of this Notice Letter.

3. Discharge Limitation/Prohibition 7

Discharge Limitation/Prohibition 7 of the MS4 Permit prohibits Orange County's MS4 discharges from causing or contributing to a condition of "pollution, contamination or nuisance," as those terms are defined in California Water Code Section 13050.

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<sup>75</sup> *Basin Plan*, at 5-148. The MS4 Permit states Dec. 30, 2013 as the deadline for REC-1. *See* MS4 Permit XVIII.C.1.

<sup>76</sup> MS4 Permit, XVIII.C.1.

a. Contamination

Orange County's continued discharge of bacteria to Newport Bay causes and contributes to a condition of contamination. The Water Code defines contamination as "an impairment of the quality of waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease."<sup>77</sup> The presence of bacteria, including fecal coliform bacteria, have been linked to illness and cause beach closures. In fact, the development of the TMDL was based on the human harm posed by elevated bacteria levels for recreational activities and shellfish harvesting. Human illnesses have been linked to recreational activities in coastal waters especially near storm drain outlets.<sup>78</sup>

Orange County's discharge of fecal coliform bacteria from its MS4 to Newport Bay are ongoing and continuous and cause a condition of contamination, as defined by the California Water Code. Orange County's MS4 discharges amount to contamination which adversely impact human health and the environment.<sup>79</sup>

b. Pollution

Orange County's continued discharge of fecal coliform bacteria to Newport Bay through its MS4 causes and contributes to a condition of pollution. The Water Code defines pollution as "the alteration of the quality of the waters of the state by waste to a degree which unreasonable affects (A) [t]he waters for beneficial uses; (B) [f]acilities which serve these beneficial uses."<sup>80</sup> It goes on to state that "pollution" may include "contamination".<sup>81</sup>

Newport Bay's REC-1 and SHEL beneficial uses are impaired due to elevated levels of fecal coliform bacteria originating from Orange County's MS4. Orange County's MS4 Permit explains, "[p]ollutants in urban runoff can impact the beneficial uses of the receiving waters and can cause or threaten to cause a condition of pollution or nuisance." It continues, "[p]athogens, such as bacteria ... can impact water contact recreation [REC-1] ... and shellfish harvesting [SHEL]."<sup>82</sup> Furthermore, elevated levels of bacterial contamination at Newport Bay beaches from urban runoff and other sources has "resulted in a number of health advisories issued by the Orange County Health Officer."<sup>83</sup>

As the MS4 Permit's principal permittee, Orange County is responsible for controlling urban runoff input and output from its MS4. Newport Bay's listing as an impaired waterbody for pathogens, and Orange County's failure to comply with the TMDL's REC-1 deadline in the MS4 Permit "cause or contribute" directly to the bacterial problem in the Bay. This continued alteration of the Bay's water quality unreasonably affects the Bay's attainment of its beneficial uses. Consequently, Orange County is causing or contributing to the condition of pollution in Newport Bay, as prohibited by the MS4 Permit's Discharge Prohibition/Limitation 7.

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<sup>77</sup> CAL. WATER CODE § 13050(k) (West 2014).

<sup>78</sup> *Id.*

<sup>79</sup> MS4 Permit, Finding 37.

<sup>80</sup> WATER § 13050(l)(1)(A)-(B).

<sup>81</sup> WATER § 13050(l)(2).

<sup>82</sup> MS4 Permit, Finding 36.

<sup>83</sup> *Id.*

c. Nuisance

Orange County's MS4 discharge of fecal coliform bacteria to Newport Bay causes or contributes to a condition of nuisance. Nuisance is defined in the California Water Code as anything which meets all of these requirements: "(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property[;] (2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal[; and] (3) Occurs during, or as a result of, the treatment or disposal of wastes."<sup>84</sup>

The continued discharge of polluted storm water and non-stormwater from Orange County's MS4 is injurious to health and results in the closure of beaches for recreational activities and the Bay for shellfish harvesting. These intermittent and permanent closures due to elevated bacteria levels impact the use of the Bay's waters, and affect the ability of businesses and their customers/patrons to use and enjoy their property. This impact affects the entire community, including visitors, although the extent of the annoyance or damage inflicted upon individuals may be unequal. Finally, Orange County's MS4 carries urban runoff, and pursuant to the MS4 Permit, may cause or threaten to cause a condition of nuisance.<sup>85</sup> Orange County's MS4 discharges into Newport Bay cause or contribute to a condition of a nuisance.

Orange County's failure to control the discharge of fecal coliform loading to Newport Bay from the MS4 have caused conditions of pollution, contamination, *and* nuisance in violation of Discharge Limitation/Prohibition 7 of the MS4 Permit. The ongoing discharge of bacteria to Newport Bay harms Coastkeeper and our members from enjoying recreational activities and engaging in shellfish harvesting activities.

Orange County's failure to properly implement the Newport Bay Fecal Coliform TMDL and the resulting discharge causing or contributing to the condition of contamination, pollutants, or nuisances in Newport Bay are ongoing and continuous. Each of these discharges is itself a violation of Discharge Limitation/Prohibition 7 of the MS4 Permit. Orange County's violations will continue each day and/or occasion that Orange County discharges contaminated water into Newport Bay in violation of the requirements of the MS4 Permit and the Clean Water Act. Orange County is subject to penalties for all violations of the Clean Water Act occurring in the five (5) years prior to the date of this Notice Letter.

**B. Orange County's Discharge of Polluted Water in Violation of Receiving Water Limitation 1 of the MS4 Permit and the Clean Water Act.**

Receiving Water Limitation 1 of the MS4 Permit prohibits discharges from the MS4 that cause or contribute to exceedances of receiving water WQS for surface waters. Discharges that cause or contribute to exceedances of WQS of surface waters constitute violations of Receiving Water Limitation 1 and the Clean Water Act.

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<sup>84</sup> WATER § 13050(m).

<sup>85</sup> MS4 Permit, Finding 36.

Available data from Orange County demonstrates that discharges from the MS4 contain elevated concentrations of pollutants such as total coliform, fecal coliform, and enterococci at levels exceeding applicable WQS by orders of magnitude. Orange County's continued discharge of bacteria-laden storm water and non-stormwater from its MS4 to Newport Bay causes continued impairment to Coastkeeper's members who cannot use and enjoy Newport Bay for REC-1 activities. Furthermore, Orange County's failure to reduce bacteria loading into Newport Bay from its MS4 frustrates compliance with the upcoming 2019 SHEL deadline. Without fundamental change by Orange County, Coastkeeper's members will remain unable to harvest shellfish in Newport Bay twenty years after the adoption of the Newport Bay Fecal Coliform TMDL.

Information available to Coastkeeper indicates discharges from Orange County's MS4 violate Receiving Water Limitation 1 every time discharges from the MS4 contain concentrations of pollutants that exceed applicable water quality standards. These violations are ongoing and will continue each time contaminated water is discharged in violation of the Receiving Water Limitations of the MS4 Permit. Each time discharges from Orange County's MS4 adversely affect beneficial uses of waters of the State is a separate and distinct violation of Receiving Water Limitation 1 of the MS4 Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. Sec. 1311(a). Orange County is subject to penalties for each violation of the Clean Water Act occurring during the past five (5) years from the date of this Notice Letter.

**C. Orange County's Violations of Section XVIII.C.1 of the MS4 Permit and the Clean Water Act Resulting from Its Failure to Comply with the Monitoring Requirements for the Newport Bay Fecal Coliform TMDL**

Section XVIII.C.1 of the MS4 Permit requires Orange County to collect five (5) samples every thirty (30) days at representative locations within San Diego Creek and Newport Bay, and analyze the samples for fecal coliform to determine compliance with the Newport Bay Fecal Coliform TMDL. Permittee compliance is determined by monitoring within the receiving waters.<sup>86</sup> Routine monitoring is necessary to assess compliance with bacterial quality objectives in Newport Bay and with the WLAs and LAs specified in the TMDL and the MS4 Permit.<sup>87</sup>

Information available to Coastkeeper indicates Orange County has failed to collect and/or analyze water quality samples at the frequency required under the TMDL in order to determine compliance with the MS4 Permit for each location. Orange County's failure to properly implement the TMDL's and MS4 Permit's monitoring requirements undermines the TMDL and violates the express terms of the MS4 Permit.

Orange County's failure to properly implement the monitoring requirements for the Newport Bay Fecal Coliform TMDL are ongoing and continuous. Each failure to implement the monitoring requirements in the MS4 Permit and TMDL is itself a violation. Orange County's violations will continue each day and/or occasion that Orange County fails to implement the monitoring requirements in the MS4 Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. Sec. 1311(a). Each time Orange County fails to implement the monitoring requirements for the

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<sup>86</sup> MS4 Permit, XVIII.E.1.

<sup>87</sup> See *Basin Plan*, at 5-119.



Newport Bay Fecal Coliform TMDL is a distinct violation of the MS4 Permit and Section 301(a) of the Clean Water Act, 33 U.S.C. Sec. 1311(a). Orange County is subject to penalties for all violations of the Clean Water Act occurring in the five (5) years prior to the date of this Notice Letter.

**D. Orange County's Failure to Submit Mandatory Compliance Reports in Violation of the MS4 Permit and the Clean Water Act**

The MS4 Permit requires Orange County to submit regular plans and reports to the Regional Board to remain in compliance with the Newport Beach Fecal Coliform TMDL. Section XVIII.E.2 of the MS4 Permit requires Orange County to reevaluate current control measures and propose additional BMPs/control measures if monitoring results indicate an exceedance of the waste load allocations. Upon approval, the permittees shall immediately start implementation of the revised plan. The aforementioned report is required to be submitted to the Regional Board's Executive Officer within 12 months of determining whether an exceedance occurred. Such reports are essential to the success of TMDL implementation plan and the Regional Board's ability to determine whether wasteload allocations are consistent with effluent limitations.<sup>88</sup>

Information available to Coastkeeper indicates that Orange County has not submitted all of the necessary reports required in the MS4 Permit. For instance, information available to Coastkeeper indicates Orange County has not submitted the monitoring report required under MS4 Permit Section XVIII.E.2. Information available to Coastkeeper also indicates that Orange County often uses a standard to measure TMDL compliance that is not reflected in the TMDL or the MS4 Permit. Orange County's failure to report its monitoring activities, and thus, failure to report specific, ongoing exceedances prevents Coastkeeper's members from taking steps to improve the Bay's water quality. The absence of reporting information results in the absence of knowledge that the problem still exists. The misrepresented reporting, using Orange County's artificial standards, results in citizens' skewed understanding of the actual breadth of the bacterial problem.

Information available to Coastkeeper indicates Orange County's failure to comply with mandatory compliance reporting constitutes a violation of the MS4 Permit and the Clean Water Act. These violations are ongoing and continuous. Each day and/or occasion that Orange County fails to submit mandatory reports is a separate and distinct violation of the MS4 Permit and the Clean Water Act. Orange County is subject to penalties for all violations of the Clean Water Act occurring in the five (5) years prior to the date of this Notice Letter.

**V. IDENTITY AND ADDRESS OF ORANGE COUNTY COASTKEEPER**

Orange County Coastkeeper  
Garry Brown, Founder and Executive Director  
3151 Airway Avenue, Suite F-110  
Costa Mesa, CA 92626  
Phone: (714) 850-1965  
Email: Garry@coastkeeper.org

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<sup>88</sup> *Id.*

## VI. RELIEF AND PENALTIES SOUGHT FOR VIOLATIONS OF THE CLEAN WATER ACT

Pursuant to Section 309(d) of the CWA, 33 U.S.C. Sec. 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. Sec 19.4, each separate violation of the CWA subjects the violator to a penalty for all violations occurring during the period commencing five (5) years prior to the date of a notice of intent to file suit letter. These provisions of law authorize civil penalties of up to \$37,500 per day per violation for all CWA violations. In addition to civil penalties, Coastkeeper will seek injunctive relief preventing further violations of the CWA pursuant to Section 505(a) and (d) , 33 U.S.C. Sec. 1365(a) and (d), declaratory relief, and other such relief as permitting by law. Lastly, pursuant to Section 505(d) of the CWA, 33 U.S.C. Sec 1365(d), Coastkeeper will see to recover its costs, including attorneys' and experts' fees, associated with this enforcement action.

## VII. CONCLUSION

Upon the expiration of the 60-day notice period, Coastkeeper will file a citizen suit enforcement action pursuant to Section 505(a) of the CWA for the above-referenced violations. During the 60-day notice period, however, Coastkeeper is eager to discuss effective remedies for the violations noticed in this letter. If Orange County wishes to discuss these violations during the 60-day notice period, please contact the Law Office of Jennifer F. Novak, 609 Deep Valley Drive, Suite 200, Rolling Hills Estates, Cal. 90274 at your earliest convenience at 310-896-2332. We hope to schedule a meeting within the next fourteen (14) days so that we may discuss an agreement to improve water quality in Newport Beach prior to the end of the 60-day notice period.

Sincerely,



Colin Kelly  
Senior Staff Attorney  
Orange County Coastkeeper

## SERVICE LIST

### VIA U.S. CERTIFIED MAIL

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Attachment A  
Orange County Annual Report Exceedances

Orange County Annual Report Exceedances

Station Location	Year	2015		2014		2013		2012		2011	
		Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage	Number	Percentage
Santa Ana Delhi Channel	FC Single Sample Exceedances	30	57.7%	24	46.2%	13	25.5%	19	36.5%	16	32.0%
	FC 30-day Running Geomean Non-compliant Instances	51	98.1%	40	76.9%	41	80.4%	30	57.7%	37	74.0%
	FC Monthly Geomean Exceedances	12	100.0%	9	75.0%	10	83.3%	8	66.7%	8	66.7%
Newport Blvd. Bridge	FC Single Sample Exceedances	8	15.4%	14	26.9%	7	13.2%	8	15.1%	10	20.0%
	FC 30-day Running Geomean Non-compliant Instances	5	9.6%	12	23.1%	10	18.9%	9	17.0%	15	30.0%
	FC Monthly Geomean Exceedances	2	16.7%	4	33.3%	3	25.0%	0	0.0%	1	8.3%
19th Street	FC Single Sample Exceedances	4	8.0%	2	4.5%	0	0.0%	0	0.0%	0	0.0%
	FC 30-day Running Geomean Non-compliant Instances	11	22.0%	5	11.4%	0	0.0%	4	7.5%	13	26.0%
	FC Monthly Geomean Exceedances	0	0.0%	0*	0.0%	0	0.0%	0	0.0%	0	0.0%

\* The precise number and percentage of exceedances at this location are unknown due to a lack of sampling between September 3rd and November 2nd, 2014.

FC = Fecal Coliform; CFU/mL = Colony Forming Units per 100mL.

FC Single Sample Exceedances Number: The count of single samples within the year that exceed 400 CFU/100mL.

FC Single Sample Exceedances Percentage: The percent of single samples within the year that exceed 400 CFU/100mL.

FC 30-day Running Geomean Non-compliant Instances Number: A non-compliant instance, in accordance with the TMDL, is either:

- 1) A running geomean result which exceeds 200 CFU/mL (where 5 consecutive samples within the 30 days preceding the date are multiplied together and then the 5<sup>th</sup> root is taken of the product); calculated as  $\sqrt[5]{(x_1 \times x_2 \times x_3 \times x_4 \times x_5)}$ ; or
- 2) A failure to report at least 5 samples within 30 days.

FC 30-day Running Geomean Non-compliant Instances Percentage: The number of non-compliant instances that occurred within the year divided by the number of samples taken.

FC Monthly Geomean Exceedances Number: A geomean calculated for each calendar month as  $\sqrt[n]{(x_1 \times x_2 \times x_3 \times \dots)}$  where all samples within the calendar month are multiplied together and then the n<sup>th</sup> root is taken of the product (where n= the number of samples in that month), and the result exceeds 200 CFU/mL.

FC Monthly Geomean Exceedances Percentage: The number of Monthly Geomeans exceeding 200 CFU/mL within the year divided by 12 months.

Attachment A  
Orange County Annual Report Exceedances

Selected/Representative Monitoring Station Exceedance Values

Station Location	Date	CFU/mL
Santa Ana Delhi Channel	8/01/2011	>=40,000
Santa Ana Delhi Channel	8/08/2011	=1010
Santa Ana Delhi Channel	8/15/2011	=280
Santa Ana Delhi Channel	8/22/2011	=280
Santa Ana Delhi Channel	8/29/2011	=210
Santa Ana Delhi Channel	9/06/2011	=6600
Santa Ana Delhi Channel	8/6/2012	=240
Santa Ana Delhi Channel	8/16/2012	=210
Santa Ana Delhi Channel	8/20/2012	=180
Santa Ana Delhi Channel	8/27/2012	=130
Santa Ana Delhi Channel	9/04/2012	=110
Santa Ana Delhi Channel	9/10/2012	=340
Santa Ana Delhi Channel	8/05/2013	=80
Santa Ana Delhi Channel	8/12/2013	=300
Santa Ana Delhi Channel	8/19/2013	=150
Santa Ana Delhi Channel	8/26/2013	=600
Santa Ana Delhi Channel	9/03/2013	=190
Santa Ana Delhi Channel	9/09/2013	=30
Santa Ana Delhi Channel	8/04/2014	>=670
Santa Ana Delhi Channel	8/11/2014	>=160
Santa Ana Delhi Channel	8/18/2014	=210
Santa Ana Delhi Channel	8/25/2014	=250
Santa Ana Delhi Channel	9/02/2014	>=280

Santa Ana Delhi Channel	9/08/2014	>=380
Santa Ana Delhi Channel	8/4/2015	=380
Santa Ana Delhi Channel	8/11/2015	>=350
Santa Ana Delhi Channel	8/18/2015	=220
Santa Ana Delhi Channel	8/25/2015	=350
Santa Ana Delhi Channel	9/01/2015	=140
Santa Ana Delhi Channel	9/08/2015	=400
Newport Blvd. Bridge	8/01/2011	=350
Newport Blvd. Bridge	8/08/2011	<10
Newport Blvd. Bridge	8/15/2011	<10
Newport Blvd. Bridge	8/22/2011	=9400
Newport Blvd. Bridge	8/29/2011	=990
Newport Blvd. Bridge	9/06/2011	=210
Newport Blvd. Bridge	8/6/2012	=40
Newport Blvd. Bridge	8/16/2012	=10
Newport Blvd. Bridge	8/20/2012	=95
Newport Blvd. Bridge	8/27/2012	=50
Newport Blvd. Bridge	9/04/2012	<10
Newport Blvd. Bridge	9/10/2012	=760
Newport Blvd. Bridge	8/05/2013	=10
Newport Blvd. Bridge	8/12/2013	=80
Newport Blvd. Bridge	8/19/2013	=20
Newport Blvd. Bridge	8/26/2013	=300
Newport Blvd. Bridge	9/03/2013	>=10